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☐ FPD ☐ Appointed ☐ CJA ☐ Pro Per ☒ Retained

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

United States of America

CASE NUMBER:

SA CR 08-156 CJC

PLAINTIFF(S),

v.

Henry Samueli

NOTICE OF APPEAL

DEFENDANT(S).

NOTICE IS HEREBY GIVEN that Henry Samueli Name of Appellant hereby appeals to the
 United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

- ☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(j)(2)
☒ Interlocutory Appeals
☐ Sentence imposed:
☐ Bail status:

Civil Matter

- ☐ Order (specify):
☐ Judgment (specify):
☐ Other (specify):

Imposed or Filed on September 8, 2008 . Entered on the docket in this action on September 8, 2008 .

A copy of said judgment or order is attached hereto.

September 22, 2008
 Date

Signature

☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Gordon A. Greenberg

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. SACR 08-00156-CJC Date August 26, 2008

Present: The Honorable CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

Interpreter None

Michelle Urie

Not Reported

Not Present

Deputy Clerk

Court Reporter/Recorder, Tape No.

Assistant U.S. Attorney

<u>U.S.A. v. Defendant(s):</u>	<u>Present</u>	<u>Cust.</u>	<u>Bond</u>	<u>Attorneys for Defendants:</u>	<u>Present</u>	<u>App.</u>	<u>Ret.</u>
Henry Samueli	Not		X	Gordon A. Greenberg	Not		X
				Hoyt Y. Sze	Not		X

Proceedings: (IN CHAMBERS) ORDER DENYING DEFENDANT DR. HENRY SAMUELI'S
UNOPPOSED EX PARTE APPLICATION

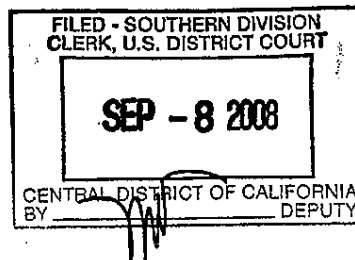
The Court, having considered Defendant Dr. Henry Samueli's Unopposed Ex Parte Application for (1) Order Sealing Objections to Presentence Report and Sentencing Recommendation, Declaration of Gordon A. Greenberg, and the Instant Application and Order; (2) Scheduling In Camera Expedited Hearing on Objections for September 2, 2008, and the lack of opposition thereto, HEREBY ORDERS that the Objections to Presentence Report and Sentencing Recommendation, the Declaration of Gordon A. Greenberg, and the Instant Application, shall not be filed but rather returned to Dr. Samueli's counsel, Gordon A. Greenberg.

The Court hereby declines to order an In Camera hearing because the parties have not made sufficient showing to justify that the hearing be held In Camera.

The Court does not see any justification for filings under seal. The allegations of the criminal indictment and SEC complaint are already a matter of public record, and no Rule 6(e) material will be disclosed as the Court will not consider the hearsay statements allegedly made by the Case Agent when it determines whether to accept or reject the parties' plea agreement. In light of the foregoing, counsel for Dr. Samueli is invited to file any objections to the PSR on or before Tuesday, September 2, 2008.

_____: 0
Initials of Deputy Clerk mu

cc:



**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

HENRY SAMUELI,

Defendant.

Case No.: SACR 08-00156-CJC

**ORDER REJECTING THE PARTIES'
PLEA AGREEMENT**

On June 23, 2008, Defendant Henry Samueli pleaded guilty to one count of making a false statement to the U.S. Securities and Exchange Commission ("SEC") in violation of 18 U.S.C. § 1001. The plea agreement between Dr. Samueli and the United States Attorney's Office ("USAO") stipulates to a sentence of five years probation and a \$250,000 fine, as well as a payment to the U.S. Treasury of \$12 million. For entering his guilty plea, the USAO promises Dr. Samueli he will not be prosecuted for his conduct related to stock option granting practices at his former company, Broadcom Corporation ("Broadcom"). The plea agreement, however, does not require Dr. Samueli to cooperate with the USAO's prosecution of other key Broadcom executives, including fellow Broadcom Co-Founder Henry T. Nicholas and

1 Chief Financial Officer William Ruehle, for their conduct in the same stock option
2 granting practices.

3
4 While the USAO and Dr. Samueli have stipulated to what they believe is the
5 appropriate sentence in this case, the Court has an independent obligation to ensure
6 that the stipulated sentence is fair, appropriate, and in the interest of justice.
7 Regrettably, the parties' proposed sentence falls short of this standard. The
8 Government has publicly levied very serious allegations of securities fraud against Dr.
9 Samueli that, if true, warrant a significant prison sentence.¹ The SEC has filed a civil
10 enforcement action against Dr. Samueli, charging him and three others with
11 perpetrating "a massive, five-year scheme that involved fraudulent backdating of
12 dozens of option grants, falsifying corporate records, intentionally false accounting,
13 and lying to shareholders."² The grand jury has returned a criminal indictment of Dr.
14 Nicholas and Mr. Ruehle that names Dr. Samueli (referred to as "H.S.") as an
15 unindicted co-conspirator in Defendants Nicholas and Ruehle's scheme to
16 fraudulently conceal \$2.2 billion in Broadcom compensation expenses. If there is any
17 truth to these allegations, a probationary sentence does not adequately reflect or
18 account for the seriousness of the underlying misconduct alleged against Dr. Samueli.

19
20 The stipulated sentence could also create unacceptable disparities in sentencing
21 between Dr. Samueli and other similarly situated defendants. Dr. Samueli's alleged
22 co-conspirators, Dr. Nicholas and Mr. Ruehle, face life sentences if convicted on all
23 counts. In fact, most defendants guilty of run-of-the-mill crimes of fraud in the Ninth
24 Circuit go to prison, serving an average of seventeen months in custody. Dr. Samueli,
25 who is not even required to cooperate with the Government's investigation, will not

26
27 ¹ References to the "Government" refer to the SEC and the USAO jointly.

28 ² Statement of Linda Chatman Thomsen, Director of the SEC's Division of Enforcement, May 14, 2008, at 1, *available at* www.sec.gov/news/press/2008/2008-87.htm.

1 spend a single day in prison under the agreement. Again, if there is any truth to the
2 Government's allegations against Dr. Samueli, this disparity is indefensible.

3
4 Finally, accepting this plea agreement will erode the public's trust in the
5 fundamental fairness of our justice system. The public expects the Court to treat all
6 defendants equally, without regard to race, religion, ethnicity, class, or wealth. The
7 \$12 million payment contained in this plea agreement suggests that Dr. Samueli's
8 wealth and popularity will allow him to avoid the consequences of his alleged
9 misconduct at Broadcom. The Court cannot accept a plea agreement that gives the
10 impression that justice is for sale.

11
12 **I. THE TERMS OF THE PLEA AGREEMENT**

13
14 Dr. Samueli and the USAO have entered into a binding plea agreement under
15 which Dr. Samueli has pleaded guilty to a single-count information charging him with
16 violating 18 U.S.C. § 1001, making a materially false statement to the SEC. (Plea
17 Agmt. ¶ 3.) According to the factual basis underlying the plea, Broadcom authorized
18 two committees to grant stock options to the company's employees: the options
19 committee and the compensation committee. (Plea Agmt. Ex. B.) Dr. Samueli,
20 Broadcom's Chief Technical Officer and Co-Chairman of the Board of Directors, was
21 a member of the options committee, which had authority to grant stock options to all
22 Broadcom employees except Section 16 officers.³ (Plea Agmt. Ex. B.) The
23 compensation committee was composed of independent, non-employee directors, and
24 had "sole and exclusive authority" to grant options to Section 16 officers. (Plea Agmt.
25 Ex. B.) Dr. Samueli was not a member of the compensation committee.

26
27 ³ A "Section 16 officer" is a corporate officer governed by Section 16 of the Securities Exchange
28 Act of 1934. (Plea Agmt. Ex. B.)

1
2 On January 3, 2002, Dr. Samueli received an email message from Nancy
3 Tullos, Broadcom's Vice President of Human Resources, regarding unresolved stock
4 option granting issues. (Plea Agmt. Ex. B.) The email read:

5
6 Just spoke with [Broadcom CEO Henry T. Nicholas]. He does NOT
7 want to grant above market options on October 1st. He would like to
8 find another opportunistic date, say \$25.55 on 10/5 or \$29.25 on 10/19.
9 He does not see a need to get as close to the \$33.68 number as I do. He
is clearly not as sensitive to the employee reaction as I am and I can't
really speak to the outside shareholder reaction.

10
11 (Plea Agmt. Ex. B-1 (emphasis in original).) The same day, Dr. Samueli responded to
12 Ms. Tullos: "OK, then go with the 10/19 price." (Plea Agmt. Ex. B-1.) Several
13 weeks later, on January 22, 2002, Ms. Tullos sent a spreadsheet listing the employees
14 who would be granted options with the October 19, 2001 strike price as selected by
15 Dr. Samueli. (Plea Agmt. Ex. B-2.) This list of grant recipients included Section 16
16 officers. (Plea Agmt. Ex. B-2.)

17
18 On May 25, 2007, Dr. Samueli appeared for a deposition before the SEC in
19 connection with the SEC's investigation into Broadcom's stock option granting
20 practices. (Plea Agmt. Ex. B.) During the deposition, the following exchange took
21 place:

22 Q: Were you in any way involved in the process of grants to Section
23 16 officers?

24 A: **I was not involved in the actual granting process**, but Mr.
25 Nicholas would make me aware of the amount of the grants that he
26 was going to give to his direct reports, the Section 16 Officers. So,
27 I was aware of the number, **but I wasn't involved in the process.**
28

1 (Plea Agmt. Ex. B (emphasis in original).) During the change of plea proceeding, Dr.
2 Samueli confirmed his understanding that the “actual granting process” included
3 selecting the grant date for the particular options. (Tr. 39:1-4, June 23, 2008.) Dr.
4 Samueli and the USAO further confirmed that no subsequent deposition testimony
5 clarified or explained Dr. Samueli’s answer in a way that would suggest his testimony
6 was not knowingly and materially false. (Tr. 11:12-15.)

7
8 The plea agreement contains a stipulated sentence pursuant to Federal Rule of
9 Criminal Procedure 11(c)(1)(C). The stipulated sentence calls for: (1) five years
10 probation; (2) a fine of \$250,000; and (3) a special assessment of \$100. (Plea Agmt. ¶
11 12.) The parties further agreed that “for making a false statement to the SEC as
12 charged in the Information, [Dr. Samueli] shall pay \$12,000,000 to the U.S.
13 Treasury.” (Plea Agmt. ¶ 12(a).) This \$12 million payment, along with the \$250,000
14 fine and \$100 special assessment, are to be paid at or before the date of sentencing.
15 (Plea Agmt. ¶ 12(b).) Finally, the plea agreement allows Dr. Samueli to petition the
16 Court for termination of his probation after three years. (Plea Agmt. ¶ 12(e).)

17
18 In exchange for his guilty plea, the USAO has agreed not to prosecute Dr.
19 Samueli for:

20 the conduct that was the subject of the USAO’s investigation of options-
21 related activity at Broadcom occurring between 1998 and 2005, and any
22 other conduct that was the subject of the USAO’s investigation related to
23 Broadcom, its officers, directors, and employees, occurring between 1998
24 and January 2003.⁴

25 (Plea Agmt. ¶ 17(b).) Notably, the plea agreement does not require Dr. Samueli to
26 cooperate with, testify in, or assist in any other way the USAO’s criminal prosecution

27 ⁴ This agreement excludes prosecution for criminal tax violations, “including conspiracy to commit
28 such violations chargeable under 18 U.S.C. § 371.” (Plea Agmt. ¶ 17(b).)

1 of other Broadcom executives related to that aforementioned investigation. (Tr. 5:5-6
2 (“[Assistant U.S. Attorney]: There is no cooperation provision. That is correct, Your
3 Honor.”) .)

4 5 **II. RULE 11(c)(1)(C) PLEA AGREEMENTS**

6
7 Rule 11 is the “principal provision in the Federal Rules of Criminal Procedure
8 dealing with the subject of guilty pleas and plea agreements.” *United States v. Hyde*,
9 520 U.S. 670, 673-74 (1997). The plea agreement before the Court is governed by
10 Rule 11(c)(1)(C) because the USAO has “agree[d] that a specific sentence or
11 sentencing range” should apply to Dr. Samueli. FED. R. CRIM. P. 11(c)(1)(C); *United*
12 *States v. Ellis*, 356 F.3d 1198, 1206 n.12 (9th Cir. 2004) (en banc). When the parties
13 reach this type of plea agreement, “the court has three options: it may accept the
14 agreement, reject it, or defer a decision until the court has reviewed the presentence
15 report.” *Ellis*, 356 F.3d at 1206 (quoting FED. R. CRIM. P. 11(c)(3)(A)) (internal
16 quotations omitted). Although the court is free to accept or reject the plea agreement,
17 it may not do so on a piecemeal basis, and the Rule 11(c)(1)(C) stipulated sentence is
18 binding upon the court’s acceptance of the plea agreement. *In re Morgan*, 506 F.3d
19 705, 709 (9th Cir. 2007). Conversely, if the court chooses to reject the plea
20 agreement, the defendant must be provided with an opportunity to withdraw his guilty
21 plea and an advisement that if the guilty plea is not withdrawn, “the court may dispose
22 of the case less favorably toward the defendant than the plea agreement
23 contemplated.” FED. R. CRIM. P. 11(c)(5).

24
25 At the June 23, 2008 change of plea proceeding, the Court accepted Dr.
26 Samueli’s guilty plea, (Tr. 42:3-4), and deferred acceptance of the plea agreement
27 pending preparation and review of the presentence report, (Tr. 42:5-43:11). The Court
28

1 is therefore left to decide whether to accept the plea agreement, thus binding the Court
2 to the parties' stipulated sentence, or to reject the agreement and allow Dr. Samueli to
3 withdraw his guilty plea should he so choose.

4 5 **III. ANALYSIS**

6 7 **A. Standard of Review**

8
9 When presented with a Rule 11(c)(1)(C) plea agreement, "it is not only
10 permitted but expected that the court will take an active role in evaluating the
11 agreement." *United States v. Kraus*, 137 F.3d 447, 452 (7th Cir. 1998). As the
12 district court traditionally exercises broad discretion over all aspects of criminal
13 sentencing, whether to accept or reject a plea agreement containing a stipulated
14 sentence is likewise left to the sound discretion of the court. *Morgan*, 506 F.3d at 712
15 (citing *Vasquez-Rameriz v. United States Dist. Court*, 443 F.3d 692, 699 (9th Cir.
16 2006)); *United States v. Nicholson*, 231 F.3d 445, 451 (8th Cir. 2000); *United States v.*
17 *Bean*, 564 F.2d 700, 703 (5th Cir. 1977)). This discretion, however, is not limitless.
18 This Court understands that the principle of separation of powers requires that the
19 executive branch—the USAO in this case—retain discretion over the charging
20 decision. As the Ninth Circuit explained in *United States v. Miller*, 722 F.2d 562, 564
21 (9th Cir. 1983):

22
23 When a prosecutor selects a charge, he has made an executive choice.
24 When a judge sentences a defendant, he has made a judicial choice.
25 When a plea bargain is placed before a court, the necessary interplay
between the charging and sentencing decisions becomes manifest.

26 In evaluating Dr. Samueli's plea agreement, the Court may not second-guess or
27 infringe upon the USAO's discretion in selecting the precise charges against Dr.
28

1 Samueli. *See id.* at 563, 565 (criticizing a district court for “categorically rejecting all
2 one-count pleas to multiple count indictments”). But, because the USAO seeks to
3 bind the Court to a stipulated sentence, the Court has an obligation to fulfill its
4 traditional sentencing role by conducting a careful analysis of the proposed plea
5 agreement and stipulated sentence.

6
7 The guiding principle in this analysis is one very familiar to the Court: the
8 interest of justice. *See Ellis*, 356 F.3d at 1209 (affirming the rejection of a plea
9 agreement that the district court found was not in the interest of justice given the
10 defendant’s criminal history and offense conduct); *Gov’t of the Virgin Islands v.*
11 *Walker*, 261 F.3d 370, 375 (3d Cir. 2001) (“A sentencing court can, of course, reject
12 the results of a plea negotiation if it concludes that the resulting agreement is not in
13 the best interest of justice.”) In applying this standard, some courts have considered
14 whether the sentence itself is too lenient. *Ellis*, 356 F.3d at 1209 (explaining that Rule
15 11 allows for the rejection of a plea agreement “when the court believes the sentence
16 is too lenient”); *United States v. Greener*, 979 F.2d 517, 520 (7th Cir. 1992) (holding
17 the district court did not abuse its discretion by concluding the plea “would not
18 adequately represent the defendant’s criminal conduct”); *Bean*, 564 F.2d at 704 (“A
19 decision that a plea bargain will result in the defendant’s receiving too light a sentence
20 . . . is a sound reason for a judge’s refusing to accept the agreement.”). Others have
21 looked to whether the plea agreement complies with and advances the purpose of
22 criminal sentencing as expressed by Congress. *United States v. O’Neill*, 437 F.3d 654,
23 661 (7th Cir. 2006) (Posner, J., concurring) (observing that § 3553a sentencing
24 factors can provide a standard for evaluating the acceptability of a plea agreement);
25 *United States v. Torres-Echavarria*, 129 F.3d 692, 696 (2d Cir. 1997).

1 The Court's inquiry into whether the plea agreement is in the interest of justice
2 must be based on an "individualized analysis of the specific facts presented by the
3 case." *Morgan*, 506 F.3d at 711 n.3 (citing *United States v. Smith*, 417 F.3d 483, 486-
4 87 (5th Cir. 2005); *United States v. Gamboa*, 166 F.3d 1327, 1330-31 (11th Cir.
5 1999); *Greener*, 979 F.2d at 519-20; *United States v. Carrigan*, 778 F.2d 1454, 1462
6 (10th Cir. 1985)). For example, in *United States v. Ellis*, the sixteen-year-old
7 defendant was initially charged with first degree murder. 356 F.3d at 1201. The
8 Government moved to try him as an adult given his prior state court conviction for
9 residential burglary. *Id.* The parties eventually entered into a Rule 11(c)(1)(C) plea
10 agreement whereby the defendant pleaded guilty to a single-count information
11 charging him with second degree murder and stipulating to a sentence of 132 months
12 in prison. *Id.* The district court rejected the plea agreement after reviewing the
13 presentence report, which disclosed three prior juvenile adjudications and seven
14 arrests and revealed "that the FBI had developed a somewhat solid case against [the
15 defendant] for premeditated murder, proof of which would support a first degree
16 murder charge." *Id.* at 1202.

17
18 On appeal, an en banc panel of the Ninth Circuit approved of the judge's
19 evaluation of the defendant's "criminal history and the circumstances of the offense
20 charged" as a basis for rejecting the plea. *Id.* at 1209. In evaluating the offense
21 conduct, the district court looked beyond the factual basis supporting the plea, and the
22 court was permitted, and arguably obligated, to probe all of the defendant's relevant
23 offense conduct, including the initial charges levied against him. *See id.*⁵ Here, the
24 Court must consider all of Dr. Samueli's conduct as alleged by the Government in
25

26
27 ⁵ The en banc panel, however, disapproved of the district court's decision to reinstate the first degree
28 murder charge because such a decision impermissibly intruded on the prosecutorial charging
decision. *Id.*

1 order to conduct an “individualized analysis” of the facts and circumstances related to
2 this plea agreement. *See Morgan*, 506 F.3d at 711 n.3.

3
4
5
6 **B. The Serious Allegations Against Dr. Samueli**

7
8 Dr. Samueli has pleaded guilty to a single-count information and was never
9 formally indicted for his role in Broadcom’s stock option granting practices between
10 1998 and 2003. However, a civil enforcement action filed by the SEC, *SEC v. Henry*
11 *T. Nicholas et al.*, SACV 08-00539-CJC(RNBx) (“SEC Complaint” or “Complaint”) and a criminal indictment of two former Broadcom executives, *United States v. Henry*
12 *T. Nicholas et al.*, SACR 08-00139-CJC (“Criminal Indictment” or “Indictment”) indentify Dr. Samueli and describe his conduct with respect to the alleged securities
13 fraud. In fact, the Criminal Indictment names Dr. Samueli seventy-two times. Given
14 the existence of these allegations, the Court’s evaluation of the plea agreement must
15 include an assessment of them, as the Government presumably had a factual basis.
16
17

18
19 As a broad overview, the allegations describe a practice at Broadcom of using
20 backdated stock options to recruit and compensate employees. Instead of taking a
21 compensation expense for the options grants, corporate officers and employees
22 falsified documents to create the appearance that the stock options were granted days
23 or weeks earlier at a low-point in the closing price of the stock. This practice allowed
24 the recipients to sell the shares at a considerable profit and relieved the company of
25 reporting the compensation charge on its balance sheet. Over the course of five years,
26 the total unrecorded compensation expenses totaled \$2.2 billion, depriving
27 shareholders, auditors, and the market of accurate information about Broadcom’s
28

1 financial health and the value of its stock. The SEC describes the scope of the scheme
2 as "the largest accounting restatement to date arising from stock options backdating,"
3 warranting "significant sanctions" against the perpetrators.⁶

4
5 By Dr. Samueli's own admission during the change of plea proceeding, he had
6 some knowledge of and participated to some degree in the alleged backdating scheme.
7 In the email exchanges proving his statement to the SEC was false, Dr. Samueli
8 selected an October 19, 2001 grant date weeks after the date had passed, on January 3,
9 2002. (Plea Agmt. Ex. B-1 ("OK, then go with the 10/19 price.")) An email received
10 by Dr. Samueli on January 22, 2002 listed all those individuals and officers who were
11 to receive stock options backdated to October 19, 2001. (Plea Agmt. Ex. B-2.) Dr.
12 Samueli was well aware of the practice of stock option backdating at Broadcom. He
13 admitted in open court that the factual basis underlying his guilty plea was true and
14 correct.

15
16 The Government's allegations, however, offer even greater detail about the
17 depth and breadth of Dr. Samueli's involvement in the alleged backdating scheme.
18 Dr. Samueli is named as one of four conspirators in the alleged scheme to commit
19 securities fraud. (Criminal Indictment ¶ 4 ("At all times relevant to this Indictment,
20 unindicted co-conspirator⁷ H.S. was Broadcom's co-founder, Chief Technical Officer,
21 and a Section 16 Officer."), ¶ 18 (alleging that the conspirators "knowingly combined,

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23
24
25 ⁶ Statement of Linda Chatman Thomsen, *supra* note 2.

26 ⁷ A co-conspirator is "[a] person who engaged in a criminal conspiracy with another; a fellow
27 conspirator." BLACK'S LAW DICTIONARY 273 (8th ed. 2004). An unindicted co-conspirator is "[a]
28 person who has been identified by law enforcement as a member of a conspiracy, but who has not
been named in the follow conspirator's indictment." *Id.*

1 conspired and agreed to commit . . . securities fraud”).⁸ “By fraudulently backdating
2 and repricing option grants,” the Indictment alleges, “defendants and their co-
3 conspirators [Nicholas, Ruehle, Samueli and Tullos] deceived Broadcom’s
4 shareholders, potential shareholders, and auditors” about \$2.2 billion in unreported
5 employee compensation expenses. (Criminal Indictment ¶¶ 15d, 17.) The scope of
6 the alleged conspiracy was extensive, resulting in “tens of millions of backdated in-
7 the-money and repriced options.” (Criminal Indictment ¶ 15c.) Because the
8 Government has named Dr. Samueli as a co-conspirator, he could be held criminally
9 responsible for all of the substantive offenses committed by his alleged co-
10 conspirators, if indicted by the grand jury.⁹ *United States v. Testa*, 548 F.2d 847, 855
11 (9th Cir. 1977) (citing *Pinkerton v. United States*, 328 U.S. 640, 647 (1946)) (“A party
12 to a conspiracy is liable for the acts of his co-conspirators in furtherance of the
13 conspiracy. . . .”).

14
15 Dr. Samueli is also alleged to have selected the dates to which stock options
16 would be backdated and falsified numerous corporate records to conceal and disguise
17 the fraud. Drs. Nicholas and Samueli, as the sole members of the options committee,
18 “in effect determined options grants for all employees, including section 16 officers.”
19 (SEC Complaint ¶ 17; Criminal Indictment ¶ 132, Overt Act 43 (alleging Dr.
20 Samueli’s participation in selecting a December 24, 2001 grant date on January 4,
21 2002), Overt Acts 35-38 (alleging Dr. Samueli received several emails documenting
22 the list of recipients of backdated options).) Broadcom relied on documents called
23 “Unanimous Written Consents” to memorialize meetings of the options committee
24

25 ⁸ (SEC Complaint ¶ 2 (alleging that the “backdating scheme was orchestrated and carried out by
26 Broadcom’s most senior executives, including . . . Henry Samueli, Broadcom’s Co-Founder and
[then-]current chairman and chief technical officer”).)

27 ⁹ Additionally, the SEC Complaint makes direct allegations about Dr. Samueli’s intent. (SEC
28 Complaint ¶ 90a (alleging intent to defraud), ¶ 87 (alleging Dr. Samueli knew that Broadcom
submitted materially false documents to conceal the fraud).)

1 where stock options were granted to employees or recruits. (Criminal Indictment ¶
2 132, Overt Act 2; SEC Complaint ¶ 18.) The Government alleges that Dr. Samueli,
3 on at least seventeen distinct occasions, signed Unanimous Written Consents to reflect
4 a meeting of the options committee that had not occurred, and which he knew had not
5 occurred. (Criminal Indictment ¶ 132, Overt Acts 2, 4-7, 11, 14, 17, 19, 27, 48-49, 55,
6 58, 62-64.)¹⁰ Instead, these falsified Unanimous Written Consents made it appear as if
7 Broadcom's options committee had met and granted at-the-money options, which
8 would not require the company to charge the option as a compensation expense.
9 Thus, these falsified Unanimous Written Consents created the documentation that
10 allowed the co-conspirators to conceal their alleged scheme from shareholders,
11 auditors, and the public. Dr. Samueli, as a member of the options committee, was a
12 necessary participant in the alleged securities fraud; if he had not falsified numerous
13 Unanimous Written Consents, Broadcom could not have created the appearance that
14 the options had not been backdated.

15
16 Dr. Samueli is also alleged to have personally advocated the use of a particular
17 fraudulent corporate acquisition technique to recruit employees to Broadcom. (SEC
18 Complaint ¶ 26.) Instead of granting stock options directly to certain recruits,
19 Broadcom manufactured false employments records to create the impression that the
20 recruit had worked for a start-up company that Broadcom intended to acquire, when in
21 fact the recruit never had. (SEC Complaint ¶ 26.) The recruit could then purchase
22 shares of the acquired company's stock at a price that was "enormously in-the-money"
23 upon the completion of the acquisition. (SEC Complaint ¶ 26.) Through this practice,
24 the conspirators were able to avoid taking a direct compensation charge by

25
26 ¹⁰ (SEC Complaint ¶ 3 ("Nicholas and Samueli each signed *dozens* of false options committee
27 unanimous written consents to memorialize numerous backdated grants.") (emphasis added), ¶ 23
28 (alleging that "Samueli knew there was no option committee meeting or decision to grant options on
the stated dates and that the terms of the grants had not been finalized on those dates").)

1 compensating its recruits through stock options in another company that were
2 guaranteed to be profitable. “[Dr.] Samueli advocated this approach for several
3 potential key employees.” (SEC Complaint ¶ 26.)¹¹ Like the falsified Unanimous
4 Written Consents, this practice represents another instance in which Dr. Samueli is
5 alleged to have created fraudulent corporate records to carry out and conceal the
6 securities fraud at Broadcom.

7
8 The Government’s allegations against Dr. Samueli are both extensive and
9 troubling. Dr. Samueli, of course, may have full and complete defenses to the
10 allegations. These allegations may not be true. While the Court in no way presumes
11 Dr. Samueli actually engaged in the alleged securities fraud, the Court simply cannot
12 ignore the allegations when conducting its inquiry under Rule 11. All potential
13 criminal liability that is to be contractually discharged under the plea agreement must
14 be considered. *See Miller*, 722 F.2d at 566. To that end, the Court is not limited to
15 considering only the offense conduct surrounding the charge to which Dr. Samueli has
16 pleaded guilty. *See Ellis*, 356 F.3d at 1201 (considering the offense conduct in the
17 initial indictment in addition to the conduct charged in the superseding information to
18 which the defendant pleaded guilty). Thus, any conduct that is to be disposed of by
19 the plea agreement must be evaluated in assessing whether the agreement is in the
20 interest of justice.

21
22 **C. The Plea Agreement is Not in the Interest of Justice**

23
24 The USAO moves the Court to accept the plea agreement as a reasonable
25 disposition of the matter. *See Miller*, 722 F.2d at 566 (instructing the district court to
26

27 ¹¹ (*See also* Criminal Indictment ¶¶ 36, 40 (describing backdated grants to the former employees of
28 “Altocom” and “Hot Haus,” two companies acquired by Broadcom).)

1 “set forth, on the record . . . the prosecutor’s reasons for framing the bargain as he
2 did”). In its sentencing position, the USAO notes several material differences
3 between Dr. Samueli and the indicted Broadcom executives, Dr. Nicholas and Mr.
4 Ruehle. Dr. Samueli was the Chief Technical Officer (“CTO”) at Broadcom. As the
5 CTO, he was principally responsible for engineering and technical matters. By
6 contrast, however, Dr. Nicholas and Mr. Ruehle were Broadcom’s Chief Executive
7 Officer and Chief Financial Officer, respectively, and they were “directly responsible
8 for financial matters and the review and approval of the financial reports that were
9 publicly filed.” (USAO Sentencing Position 14.) As CTO, Dr. Samueli did not sign
10 any public filings or have any duties related to accounting, finances, and securities
11 regulations.¹² (USAO Sentencing Position 14.) The USAO further points out that Dr.
12 Samueli has pleaded guilty to a distinct crime, making a false statement, whereas Dr.
13 Nicholas and Mr. Ruehle are charged with entirely different, more serious crimes.

14
15 The USAO also offers a number of reasons why a probationary sentence is an
16 appropriate punishment for Dr. Samueli’s false statement to the SEC. First, his
17 offense level is four, putting him in Zone A of the sentencing guidelines with a
18 sentencing range of zero to six months, commonly resulting in a probationary
19 sentence. See U.S.S.G. § 5B1.1. The USAO also notes that Dr. Samueli has agreed to
20 make a \$12 million payment to the U.S. Treasury, a “significant sum, which is being
21 paid in recognition of the import and impact of [Dr. Samueli’s] false testimony to the
22 SEC” (USAO Sentencing Position 11.) The USAO further points to Dr.
23 Samueli’s personal life, including his pioneering technological activities, charitable
24 and philanthropic works, and lack of any attempt to conceal his behavior. (USAO
25 Sentencing Position 12.) Finally, the USAO suggests that the probationary sentence is

26
27 ¹² The USAO overlooks the fact that Dr. Samueli was Broadcom’s Co-Founder and served as the
28 Co-Chairman of the Board of Directors during much of the relevant period.

1 reasonable because Dr. Samueli will face a number of collateral consequences from
2 pleading guilty to a felony count, including the termination of his association with
3 Broadcom, suspension of ownership of a professional hockey team, potential removal
4 of his name from two universities' schools of engineering, and a tarnished legacy.
5 (USAO Sentencing Position 12-13.)

6
7 After careful consideration of all the facts and circumstances presented by this
8 plea agreement, including the offense conduct, the allegations of Dr. Samueli's role in
9 Broadcom's alleged securities fraud, the parties' position regarding sentencing, and
10 Dr. Samueli's criminal history and personal characteristics, the Court cannot conclude
11 that the plea agreement, which calls for a five-year probationary sentence, is in the
12 interest of justice. While the interest of justice is animated by many fundamental
13 concepts, several are paramount with respect to criminal sentencing. To serve justice,
14 the sentence must reflect the severity of the offense conduct, including all the facts
15 and circumstances of the crime. The sentence must not create an obvious disparity
16 between one criminal actor and other similarly situated criminal actors. And the
17 sentence must protect the public's interest in enforcement of, and respect for, our laws
18 and system of justice. *See generally* 18 U.S.C. § 3553(a); U.S.S.G. § 6B1.2,
19 Commentary. For a number of reasons, this plea agreement does not satisfy those
20 important principles.

21
22 First and foremost, the proposed five-year probationary sentence does not
23 reflect the seriousness of Dr. Samueli's alleged misconduct. Dr. Samueli is named in
24 the Criminal Indictment as one of four conspirators who concealed \$2.2 billion in
25 corporate compensation expenses by backdating stock options. (Criminal Indictment
26 ¶¶ 4, 15, 17, 18.) As a result of this alleged fraud, investors and shareholders were
27 deceived about the true financial health of Broadcom and the value of its stock. In
28

1 support of the plea agreement, the USAO's urges that Dr. Samueli merely occupied
2 himself with technical matters. However, the SEC Complaint and Criminal
3 Indictment allege that Mr. Samueli falsified dozens of corporate records to further and
4 disguise the fraud, (Criminal Indictment ¶ 132, Overt Acts 2, 4-7, 11, 14, 17, 19, 27,
5 48-49, 55, 58, 62-64), selected the date to which options should be backdated, (SEC
6 Complaint ¶ 40), and advocated the creation and use of fraudulent employment
7 records to compensate recruits with backdated grants through acquired companies,
8 (SEC Complaint ¶ 26). The Court cannot overlook the allegations about Dr.
9 Samueli's conduct with respect to the alleged backdating scheme at Broadcom. The
10 interest of justice is not served by a sentence that is too lenient and fails to adequately
11 capture the seriousness of the offense. *See Ellis*, 356 F.3d at 1209 (explaining that
12 Rule 11 allows for the rejection of a plea agreement "when the court believes the
13 sentence is too lenient").

14
15 The Court is not alone in concluding that a five-year probationary sentence does
16 not capture the seriousness of Dr. Samueli's alleged misconduct. The presentence
17 report prepared by the U.S. Probation office concludes that a probationary sentence is
18 insufficient and recommends a twelve-month term of incarceration. The presentence
19 report notes that the factual basis for Dr. Samueli's guilty plea for making a false
20 statement indicates that Dr. Samueli was aware of the backdating practices at
21 Broadcom and, in fact, participated in backdating by selecting grant dates.
22 (Presentence Report 6.) The report describes Dr. Samueli as an "active and knowing
23 participant" in the criminal scheme, albeit with lesser culpability than Dr. Nicholas or
24 Mr. Ruehle who face criminal charges. (Presentence Report 6.) Given Dr. Samueli's
25 alleged involvement in the securities fraud, the probation officer recommends a six-
26 month upward variance from the high end of the advisory guideline range. Any lesser
27 sentence, the presentence report states, "would fail to adequately reflect the
28

1 seriousness of the offense or sufficiently address the issues of just punishment and
2 adequate deterrence.” (Presentence Report 7.)

3
4 The five-year probationary sentence is also contrary to the interest of justice
5 because conceivably, it is vastly disproportionate to similarly situated defendants, both
6 with respect to Dr. Samueli’s co-conspirators in this securities fraud, and with respect
7 to all defendants sentenced for crimes of fraud. First, two of Dr. Samueli’s alleged co-
8 conspirators face prison sentence that could last for the remainder of the natural lives,
9 340 years for Dr. Nicholas and 370 years for Mr. Ruehle.¹³ All three held senior
10 executive positions at Broadcom, Dr. Nicholas as CEO, Mr. Ruehle as CFO, and Dr.
11 Samueli as CTO. All three are named as co-conspirators in the backdating scheme
12 and were active participants in the backdating scheme. And all three are alleged to
13 have selected fraudulent grant dates and falsified corporate documents. Even
14 assuming as true that Dr. Samueli is less culpable than Dr. Nicholas and Mr. Ruehle,
15 the disparity between five years of probation and over 300 years of imprisonment is
16 inexplicable.

17
18 A similar disparity is evident with respect to Nancy Tullos, another co-
19 conspirator in the backdating scheme, who has also pleaded guilty to a lesser charge.
20 Ms. Tullos pleaded guilty to a single count of obstruction of justice for instructing a
21 human resources employee to delete an email communication related to stock options.
22 *See United States v. Tullos*, SACR 07-00274-CJC, Docket Entry 6, 11/30/07. Under
23 the plea agreement entered into by the USAO, Ms. Tullos’ proposed base offense
24 level, prior to any downward departure for her cooperation, is thirteen. Dr. Samueli’s
25 base offense level by comparison is four. Assuming Ms. Tullos has a criminal history

26
27 ¹³ See Statement of Thom Mrozek, United States Attorney’s Office for the Central District of
28 California, June 5, 2008, at 2, *available at* www.usdoj.gov/usao/cac/pressroom/pr2008.078.html.

1 category of "I," the guideline sentencing range under the plea agreement calls for
2 twelve to eighteen months in prison. Dr. Samueli, a fellow conspirator to Ms. Tullos,
3 is only subject to five years probation despite his more senior positions—CTO, Co-
4 Founder of the company, and Co-Chairman of the Board.¹⁴ Moreover, Ms. Tullos was
5 required to cooperate with the USAO's investigation and prosecution of Dr. Nicholas
6 and Mr. Ruehle as a condition of her plea agreement.

7
8 Similarly, the proposed five-year probationary sentence is inconsistent with the
9 vast majority of sentences imposed upon defendants for criminal fraud. In 2007, of
10 the 1,512 individuals sentenced for fraud in the Ninth Circuit, over seventy percent
11 were sentenced to prison; only fifteen percent received sentences of probation alone.
12 U.S. Sentencing Commission, Statistical Information Packet, Fiscal Year 2007, Ninth
13 Circuit at p. 8, Table 5, *available at* www.ussc.gov/JUDPACK/2007/9c07.pdf. Of
14 those sentenced to prison in the Ninth Circuit, the average (mean) length of
15 imprisonment was 17.1 months. *Id.* at Table 7. Here, Dr. Samueli is alleged to have
16 actively participated in a securities fraud disguising \$2.2 billion in compensation
17 expenses from shareholders, auditors and the SEC. Few, if any, of the fraudulent
18 schemes documented in the 2007 sentencing statistics could conceivably approach the
19 magnitude of the alleged fraud at Broadcom. A probationary sentence for the massive
20 fraud at Broadcom is thus starkly inconsistent with the seventeen-month sentence that
21 is typical for the average defendant guilty of fraud.

22
23 Finally, the Court does not find the plea agreement in the interest of justice
24 because Dr. Samueli is not required to cooperate with federal authorities in their
25

26 ¹⁴ The Court recognizes that Ms. Tullos' plea agreement does not include a provision to pay a \$12
27 million penalty to the U.S. Treasury. However, the Court feels confident in presuming that no
28 defendant would object to a \$12 million payment to avoid prison if his or her net worth were
anywhere near that of Dr. Samueli.

1 investigation and prosecution of backdating at Broadcom. Unlike Ms. Tullos, Dr.
2 Samueli is not obligated under the agreement to testify or cooperate with the USAO in
3 the trial of Dr. Nicholas or Mr. Ruehle. (Tr. 5:5-6.) Undoubtedly, Dr. Samueli has
4 enormous information and insight into the activities of Dr. Nicholas and Mr. Ruehle
5 given his status and position at Broadcom. Dr. Samueli served with Dr. Nicholas on
6 Broadcom's options committee, (Criminal Indictment ¶ 10), he communicated with
7 Dr. Nicholas and Mr. Ruehle regarding backdated options, (Criminal Indictment ¶ 93),
8 and he was involved in the review of public filings, (SEC Complaint ¶¶ 69, 77). Dr.
9 Samueli's testimony about these events and practices would aid the USAO's
10 prosecution tremendously, yet he is under no obligation to testify. In fact, his counsel
11 has stated in open court that he may invoke the Fifth Amendment if called to testify,
12 as is his right. Approving a lenient plea agreement without any provision for
13 cooperation by Dr. Samueli does not promote the public's respect for the judiciary or
14 serve the public's interest in efficient administration of criminal justice. For that
15 reason, too, this plea agreement is not in the interest of justice.

16
17 The USAO argues that Dr. Samueli's \$12 million payment to the U.S. Treasury
18 should alleviate the Court's concern about any perceived leniency in the sentence. Far
19 from alleviating the Court's concerns, however, the \$12 million payment instead
20 exacerbates the injustice of this sentence. The plea agreement characterizes the
21 payment as one made "for making a false statement to the SEC." (Plea Agmt. ¶
22 12(a).) Under § 1001, the statutory maximum fine for making a false statement to
23 federal authorities is \$250,000.¹⁵ This additional monetary penalty suggests that the
24 USAO recognizes that a sentence of five years probation and a \$250,000 fine does not
25 adequately capture the seriousness and extent of his alleged misconduct. If the
26

27 ¹⁵ The USAO argues the \$12 million payment is not part of the sentence, but is instead a separate
28 and distinct contractual payment.

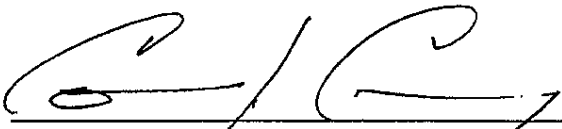
1 sentence contemplated by the plea agreement were adequate, the Government would
2 have no further need to request \$12 million from Dr. Samueli. Or, if Dr. Samueli's
3 misconduct justified a sentence more severe than five years probation and a \$250,000
4 fine, the USAO should have recommended it.

5
6 It would erode the public's perception of our justice system to accept a plea
7 agreement containing an unprecedented payment of \$12 million to resolve the
8 criminal liability of one of four co-conspirators in an alleged \$2.2 billion securities
9 fraud. The payment allows for a strong inference that the Government accepted this
10 staggering sum of money in return for a recommendation that Dr. Samueli receive a
11 probationary sentence as opposed to any term of imprisonment or confinement. The
12 public expects justice to be administered fairly, without regard to a defendant's race,
13 religion, ethnicity, class, or wealth. No sentence can be based on the amount of
14 money a defendant is willing and able to pay.

15
16 Given all these facts and circumstances, the Court cannot accept this plea
17 agreement. The probationary sentence agreed to by the parties does not capture the
18 seriousness of Dr. Samueli's alleged conduct; it has the potential of creating huge
19 disparities between the sentences, or potential sentences, of similarly situated
20 defendants; it does not promote efficient administration of justice; it does not inspire
21 public respect for our criminal justice system; and it gives the appearance that wealthy
22 and popular defendants are given more lenient and favorable plea deals. The Court
23 takes no pleasure in reaching this decision. Dr. Samueli's public works as an
24 entrepreneur, technological innovator, community leader, and philanthropist are
25 beyond reproach. Moreover, he is entitled to a presumption of innocence in this
26 Court. However, every plea agreement containing a stipulated sentence must be fully
27 and carefully evaluated by the Court to ensure that it serves the interest of justice.
28

1 In light of the serious securities fraud in which Dr. Samueli is alleged to be a co-
2 conspirator, this plea agreement is not in the interest of justice, and it must therefore
3 be rejected.

4
5 DATED: September 8, 2008

6
7
8 
9 CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE